

No. 48190-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

ROGER DALE ST. GEORGE,

Appellant,

vs.

JEANNE ELLEN ST. GEORGE,

Respondent.

REPLY BRIEF OF APPELLANT

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REPLY ARGUMENT

RAP 10.3

The Brief of the Respondent suggests that a failure to reference each finding by number is, by itself, grounds for establishment of verities on appeal. This position however ignores the fact Appellant's Brief seeks review of claimed errors which are included in the assignments of error or are clearly disclosed in the associated issues pertaining thereto. In the case of *Marriage of Knight*, 75 Wn. App. 72, 800 P.2d 71 (1994) the court found that Mr. Knight failed to assign error to the trial court's findings by literally not mentioning them in the appellate brief. Additionally, his claims were inconsistent with the Findings of Fact. Likewise in *Seven Sales, LLC v. Otterbein*, 199 Wn.App. 204 (2015) ____ P.3d ____; the appellant failed to challenge the trial court's findings of fact in any way. Consistent with RAP 10.3(g) Mr. St. George clearly disclosed in the associated issues pertaining thereto each of the findings of fact subject of his appeal. The Respondent was able to adequately identify and had an opportunity to respond to each of those errors/findings and even identified most of them by number in the Respondent's own brief.

Sanctions ordinarily adhere for inadequate briefing that fails to comply with Rules of Appellate Procedure, but in this case sanctions are unwarranted and should certainly not result in verities on appeal as

suggested by the Respondent. *Rhinevault v. Rhinevault* (1998) 91 Wash.App. 688, 959 P.2d 687, review denied 137 Wash.2d 1017, 978 P.2d 1097.

The appeals court have considered an appellant's challenge to the trial court's jury instructions despite the fact that the appellant failed to make separate assignments of error for each jury instruction, or proceed in accordance with RAP 10.3 where it was apparent from the opposing party's brief, that the opposing party understood the nature of the challenge and the instructions at issue; when a brief clearly discloses what action is considered erroneous and the opposing party has had no difficulty responding to the issue, the appellate court may consider the argument. *Honegger v. Yoke's Washington Foods, Inc.* (1996) 83 Wash.App. 293, 921 P.2d 1080, reconsideration denied, review denied 131 Wash.2d 1016, 936 P.2d 416.

RAP 10.3(a)(3) requires that an appellant state concisely each error; however, RAP 1.2(a) calls for a liberal interpretation of the rules. The application of such principles is found where and it is clear that the party made clear to the opposition its arguments on appeal. *Viereck v. Fibreboard Corp.* (1996) 81 Wash.App. 579, 915 P.2d 581, review denied 130 Wash.2d 1009, 928 P.2d 414.

RAP 10.3 does not prevent an appellate court from considering a party's argument despite a failure to properly assign error when the brief clearly discloses what action is considered erroneous and the opposing party is presented with no difficulty in responding to the issue. *State v. Clark* (1988) 53 Wash.App. 120, 765 P.2d 916, review den 112 Wash.2d 1018. The same applies to allow the court to consider the merits of an appeal when the nature of the challenge is clear and the challenged findings are set forth in the party's brief. *Green River Comm College Dist No. 10 v. Higher Education Personnel Board* (1986) 107 Wash.2d 427. See also, *State v. Estrella* (1990) 115 Wash.2d 350, 798 P.2d 289. A party's failure to specifically assign error to a finding of fact does not preclude review of that finding under RAP 10.3(g) if the party's brief clearly indicates that he is challenging the finding. *Lewis v. Estate of Lewis*, 45 Wash.App. 387 (1986).

Here the Respondent, Mrs. St. George had no difficulty timely responding to the Appellant's assignments of error and even identified particular Findings of Fact by the appropriate numeral in each assignment of error. Mrs. St. George did not allege in her brief that she had any difficulty doing so. Additionally, some assignments of error were not related to a specific finding and may be reviewed de novo.

Under RAP 1.2(a), which makes the serving of justice of greater importance than a strict technical application of the rules, the failure to make specific reference in an assignment of error to a challenged finding as required by RAP 10.3(g) will not prevent review when the nature of the challenge is clear and the finding in question is set forth in the text of the argument on the issue. *Daughtry v. Jet Aeration Co.* (1979) 91 Wash.2d 704, 592 P.2d 631. Mr. St. George's Appellant Brief clearly discloses what actions are considered erroneous and the Respondent did not allege having any difficulty responding.

Assignment of Errors Nos. 1 & 2.

Assignment of Errors Nos. 1 & 2 are both related to Findings of Fact 2.9. The Respondent in this case has the burden of presenting clear and convincing proof that a transaction to obtain interests in community property falls within a separate property exception. *Dean v. Lehman*, 143 Wash .2d 12, 19-20, 18 P.3d 523 (2001) overcoming the presumption that this property is community property. The Respondent fails to identify the testimony or exhibits she alleges support Findings of Fact 2.9 and rather identifies a single declaration of the Respondent (CP-9-13) wherein she made allegations but presented no evidence at trial. The Respondent failed to meet her burden to present clear and convincing proof that the transactions fell within a separate property exception. The Appellant

provided evidence to establish that interests were all acquired during the marriage as set forth by reference to the record in the Appellant's Brief. The trial court noted Appellant's name never appeared on a deed, however property is not characterized by title or in the name under which it is held. *In re Marriage of Skarbek*, 100 Wn. App. 444, 448, 997 P.2d 447 (2000); *In re Marriage of Hurd*, 69 Wn. App. 38, 848 P.2d 185, review denied, 122 Wn.2d 1020 (1993). Although Respondent argues on appeal that Appellant's name also does not appear on "inherited" bank accounts, the name on the accounts does not characterize the property. *Id.* In addition, the subject money was taken by Respondent from an account jointly held with her father and deposited into the community checking account she held jointly with Mr. St. George. (CP 13, Lns. 11-19.) Respondent further failed to present any evidence at trial to trace funds she alleges were placed into the community account with her husband and therefore failed to make any legal argument or citation to such evidence at trial or on appeal.

Respondent's brief completely fails to address the trial court's failure to make adequate findings necessary to review whether the Respondent was able to overcome the rebuttable presumption that the interests were community as identified in Appellant's assignments of error Nos. 1 and 2.

Assignment of Error No. 3.

The appellant's brief clearly indicates that he is challenging Finding 2.8.B. and the underlying basis as it is unsupported by the record. The evidence at trial is set forth in the written franchise agreements and the Respondent, like the trial court, appears to ignore the evidence that contradicts the settlement email relied upon by the trial court. Additionally, where the value depends on contingencies or future events a number of theories and principles are applied so as to not award inequitable or speculative property awards. *Farmer v. Farmer*, 172 Wash. 2d 616, 627-28, 259 P.3d 256 (2011). The trial court in the present case waded into the economic morass of ascertaining present value of the 7-11 franchises even where both parties testified there were many contingencies before a tenured rebate would be valued or lost entirely and that the value was determined by the franchisor at the time of an actual sale. The court should have applied any of several methods to divided the tenured rebate value at the time it was received, if ever. This was suggested as an equitable remedy by the Appellant at trial. (RP 296-297) This evidences the court's lack of consideration for the testimony given on this issue, as both parties testified to the same understanding of valuation for the

tenured rebates and the related contracts were admitted into evidence by Mr. St. George.

The Brief of Respondent does not cite any legal authority for the arguments made in opposition to Mr. St. George's position and should therefore be disregarded. RAP 10.3 (a)(5); *see also*, *State v. Dennison*, 115 Wn.2d 609, 629, 801 P.2d 193 (1990). *Smith vs. King*, 106 Wn.2d 443, 451-2, 722 P.2d 796 (1986).

Assignment of Error No. 4.

Again, the assignment of error was easily identified by number as Findings 2.12 and was clearly set forth in the brief of the Appellant. The intent of this rule is to not hide or require the opposing party to speculate as to whether assignment of error is assigned to the Finding of Fact. The Respondent easily identified the assignment of error by number and then makes a blanket statement without citation to the record, that a review of the testimony provides substantial evidence to support the findings of fact. The trial court is required to consider certain statutory factors when establishing spousal maintenance. *R.C.W. 26.09.090* and is furthered governed strongly by the need of one party versus the ability to pay an award. Respondent's brief fails to make citation to Mrs. St. George's testimony or any evidence that supported the amount of maintenance ordered. Curiously, the Respondent cites a temporary restraining order

and ignores the Appellant's Brief citation to her sworn declarations and pleadings wherein, even after considering the payments of debt; Mrs. St. George sought not even one half of the maintenance ordered by the court. (See CP 10, 13 and 114.) Making maintenance reviewable does not absolve the court from entering findings sufficient to support the award of spousal maintenance. The trial court abused its discretion and failed to enter findings to provide a basis for an award of indefinite spousal support in particular that which extends beyond retirement.

Assignment of Errors No. 5 & 6.

Respondent alleges maintenance was originally set low to reflect the payments the Appellant agreed to make on household expenses, however the Respondent fails to cite the trial court record. There is no citation to the record made at the entry of said temporary orders. The Brief of Respondent does not cite any legal authority for the arguments made in opposition to Appellant's position and should therefore be disregarded. RAP 10.3 (a)(5); see also, State v. Dennison, 115 Wn.2d 609, 629, 801 P.2d 193 (1990). Smith vs. King, 106 Wn.2d 443, 451-2, 722 P.2d 796 (1986).

Appellant's brief clearly identified through citations to the record that several items were misreported on the marital lien document prepared by counsel for Mrs. St. George. The Court erred by leaving these items

out of the calculation of the marital lien and on appeal Respondent fails to cite or allege any contradictory evidence. Mr. St. George used his separate property (post separation, after tax income) to reduce the principle balance of the mortgage and was not credited for this in the equalization judgment awarded by the court. Respondent's appellate brief fails to recognize that Mrs. St. George agreed throughout the trial that Mr. St. George should be reimbursed. (RP 29-30 and 89-90) The trial court erred by not ordering that Mr. St. George receive this reimbursement and credit on the equalization judgment/ martial lien entered against him. The first time it became apparent Mrs. St. George did not agree to reimbursement was upon presentation of the final pleadings prepared by her counsel. The issue was never raised at the time of trial, but the trial court refused to provide the credit against the judgment that was agreed throughout the continued trial process.

Assignment of Error No. 7.

This assignment of error rests primarily upon the mischaracterization of property, valuation of the business and other assignments of error, which collectively results in a gross abuse of discretion rather than a nominal difference of opinion on personal property items, especially wherein Respondent declared the basic personal property items to have been equally or fairly divided. Had the court properly

retained jurisdiction to divide any 7-11 tenured rebate between the parties, properly characterized the property of the community and included all property items that were before the court for separation then the trial court would have awarded some minor lien against Mrs. St. George and an award of half of the tenured rebate, if any. Instead there is a gross and inequitable division of assets and debts which violates RCW 26.09.080. These values and the overall impact are set forth more fully in the Appellant's brief (See Brief of Appellant Pages 44-45.) Respondent's Brief fails to respond in any way to the record citations made by Appellant in this regard.

Mrs. St. George's Request for Attorney's Fees on Appeal.

RCW 26.09.140 allows a court to award attorney fees if a party demonstrates financial need. The court must also consider the ability of the opposing party to pay attorney's fees. The court awarded nearly all of the property and liquid account balances to Mrs. St. George who does not have a financial need and Mr. St. George is left without the ability to pay his own attorney. No Affidavit of Financial Need has been filed in this case and all requests for fees should be denied. Just as in the trial court, Mrs. St. George has failed to provide evidence of need or of Mr. St. George's ability to pay. The Respondent cannot demonstrate need under

the statute and applicable court rules and therefore her request must be denied. *In re Marriage of Konzen*, 103 Wn.2d 470, 478, 693 P.2d 97, *cert. denied*, 473 U.S. 906 (1985); RAP 18.1.

CONCLUSION

The Appellant made clear in the appellate brief that he was challenging particular findings, which were all easily identified by the Respondent and should not become verities on appeal for simply not identifying the numeral of said Findings.

The court should review de novo the mischaracterization of the property and enter findings related thereto. The trial court should be directed to recalculate the equalization judgment if any, after incorporating the seven (7) changes identified in the Brief of the Appellant at pages 44 and 45.

Spousal maintenance should be reduced to comply with the statutory factors and findings should be entered consistent with the evidence as to any spousal maintenance award.

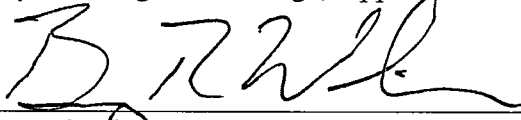
Specific findings should be entered regarding the valuation of the business interests to include retained jurisdiction to award a split of the tenured rebate, if any, so that appellate review can occur if necessary.

There should be no award of attorney's fees or costs.

Dated: September 23, 2016.

Respectfully Submitted,
PARKER, WINKELMAN & PARKER


Attorneys for Roger St. George, Appellant

By: 
Benjamin R. Winkelman WSBA #33539

CERTIFICATE OF MAILING

I certify that on September 23, 2016, I mailed a copy of the foregoing Reply Brief of Appellant, by placing the same in the United States Postal Service, postage prepaid, to:

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PARKER & WINKELMAN LAW OFFICE

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